Filed 6/26/09 P. v. Gomez CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LOUIS BENJAMIN GOMEZ, Defendant and Appellant.	G040992 (Super. Ct. No. 08CF1594) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed.

Suzanne C. Skolnick, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Louis Benjamin Gonzalez was convicted by jury of possession of cocaine (Health & Saf. Code, § 11350) and drug paraphernalia (Health & Saf. Code, § 11364). Allegations of a prior strike conviction and a prior state prison conviction were found by the court to be true (the latter was stricken for purposes of sentencing), and he was sentenced to 32 months in state prison. He appealed, and we appointed counsel to represent him on appeal. Counsel filed a brief which set forth, in considerable detail, the facts of the case and points counsel had considered as possible appellate issues. Counsel did not argue against his client, but advised the court he could find no issues to argue on appellant's behalf. Appellant was given 30 days to file written argument in appellant's own behalf. That period passed, and we received no communication from appellant.

We examined the record ourselves to see if we could find any arguable issue and found no arguable error in the determination of Gomez's guilt. There were factual issues to be resolved, and they were largely resolved against Gomez, but the legal issues in the case were properly resolved and we find ourselves in agreement with appellate counsel that there are no appellate issues with a reasonable prospect of success with respect to Gonzalez's guilt.

FACTS

Appellate counsel did an admirable job of collecting the facts of the case in analyzing his possible arguments. Since we have found no significant errors or omissions in his recitation of those facts, we adopt that statement of facts for consideration of the case: On May 22, 2008, Santa Ana Police Officer Joe Castellanos was on patrol at 1700 West Walnut Street in Santa Ana, California. The area is heavily populated with transient activity. The area is also known as a high crime area in terms of narcotic activity. The officer was instructed by his commanders to patrol the area. He was not sent to the location on a tip.

While in his patrol car, Officer Castellanos saw appellant who was with two other individuals. Appellant and the other two individuals were together at a log. Appellant was squatting down with his back to the officer, using the log like a table. Appellant was in between the two other individuals who were both facing the direction of the officer. The other two individuals were seated on the log. They were seated approximately one foot away from appellant. Officer Castellanos exited his vehicle and approached the three "quietly" on foot. The officer saw that the other two individuals had their hands over their knees. He could not see anything in their hands. The officer could not see appellant's hands.

Once Officer Castellanos was between five to seven feet from appellant, he asked to see appellant's hands. He also announced he was a police officer. At that moment, appellant's back was still turned toward the officer. Appellant did not respond to the officer's request. Officer Castellanos then drew his gun, increased the tone in his voice and asked again to see appellant's hands. In response, appellant stood up without turning around, dropping some items as he did so. From the left side of appellant's body, the officer saw appellant drop a blue lighter. From the right side of appellant's body, the officer saw he dropped a crack pipe. The other two individuals did not make any throw-away motions at the scene, nor did the officer see anything drop from their hands or body. Officer Castellanos then moved all three individuals to the curb where he had them sit while he waited for his backup to arrive.

After the officer's backup arrived, appellant was searched at the scene. In appellant's jacket pocket the officer found a clean glass pipe, similar to the burnt pipe he saw appellant drop when appellant stood up. At the location where appellant had been squatting, the officer found pieces of crack cocaine, the pipe and the lighter and some strings of Brillo pad. The officer testified that strings of Brillo pad are used as filters when smoking crack cocaine. The pieces of crack cocaine found at the scene were tested by Officer Castellanos with the result being positive for crack cocaine. At trial, the

parties stipulated that it was a usable quantity. After collecting the evidence at the scene, appellant was placed under arrest.

While still at the scene, and while under arrest, but before being given his *Miranda*[1] warnings, the officer questioned appellant about the cocaine found at the scene. Initially, both appellant and the other two individuals detained denied the cocaine was theirs. Officer Castellanos continued to ask appellant about the cocaine, eventually eliciting an inculpatory statement from appellant that he had paid $10 for the cocaine.

Appellant was then handcuffed and transported to Santa Ana Jail by Officer Castellanos. Upon arrival at the jail, appellant was taken directly into an interview room by Officer Castellanos. Officer Castellanos then read appellant his *Miranda* rights, which appellant acknowledged he understood. Officer Castellanos then questioned appellant again regarding the cocaine found at the scene. The officer's interview with appellant at the jail was not recorded. Appellant told the officer that he had bought the cocaine for $10, that he smoked crack earlier that evening and that he was getting ready to smoke crack again with the other two individuals. Appellant also told the officer that he had back problems and that was the only way to get rid of his pain.

DISCUSSION

Among the issues we considered in this case was whether Gomez's statement to the police at the station was properly introduced. His field statement was suppressed under *Miranda, supra,* but the subsequent statement he gave at the station was not challenged. Appellate counsel sagely considered whether an ineffective assistance of counsel argument could be mounted based upon this.

We conclude it could not. Under *Strickland v. Washington* (1984) 466 U.S. 668, 687, entitlement to relief for ineffective assistance of counsel would require Gomez to show both that trial counsel failed to act in a manner to be expected of

[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

reasonably competent attorneys acting as diligent advocates and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. Here the second prong of that test cannot be fulfilled, so we need not address the first one.

Officer Castellanos testified he had seen defendant drop a lighter and a glass pipe when police approached. When he picked them up he found cocaine there. Gomez had a similar glass pipe in his pocket. So if the jury believed Officer Castellanos, there was plenty of evidence to convict Gomez. The statement would have added to that evidence considerably, except that the statement was reported by Officer Castellanos. That means the statement added nothing unless the jury found Officer Castellanos credible, in which case it was unnecessary.

Put another way, if the jury believed Officer Castellanos when he said appellant dropped a crack pipe and lighter (and, inferentially, cocaine) upon his approach, they had enough to convict Gomez without his statement at the police station. And if they didn't believe Castellanos about what happened in the field, there was no reason to believe him about the unrecorded statement he said he took at the station. Indeed, if they did not believe him about what he saw in the field, there was every reason *not* to believe him about the statement at the station. Its admissibility was therefore a moot point and not the basis for appellate review.

Another consideration was whether a Penal Code Section 1538.5 motion should have been made in the case, contesting the original detention and arrest of Gomez. We conclude a motion to suppress would have been bootless in this case. The officer, on patrol at 7:00 p.m. in an area known for heavy drug activity, approached three individuals and asked to see their hands.[2] One of them, Gomez, was squatting with his back to the

[2] A request by an officer to see a person's hands, under the circumstances of this case is wholly reasonable and would not, in and of itself, convert a consensual encounter into a detention. Gomez had already dropped the glass pipe by the time the officer took any further steps toward detaining him.

officer. He did not immediately respond, and when he stood up, he dropped a lighter and a glass pipe. That would have justified the detention that ensued ("A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in the light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.") (*People v. Souza* (1994) 9 Cal.4th 224, 231), and the subsequent identification of cocaine on the ground where Gomez had been squatting provided probable cause for his arrest.

The court did not err in denying Gomez's motion for acquittal under Penal Code section 1118.1. The testimony of one witness, if believed, is sufficient to prove any fact. Officer Castellanos' testimony was sufficient to defeat the motion.

Nor was there error in denying Gomez's request to strike his prior under Penal Code section 1385, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. This is a decision for which the trial court is uniquely suited, especially after presiding over a jury trial, and the law has recognized this in requiring appellate tribunals to review such decisions under the deferential abuse of discretion standard. We are not empowered to reverse such calls unless they are "irrational or arbitrary." (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.)

In this case, there was nothing irrational or arbitrary about the trial court's call. It was well reasoned, carefully considered, and clearly articulated on the record. It included consideration of the age and circumstances of the prior conviction as well as Gomez's subsequent history since. It appears to us to have been a model for determination of such issues.

Nor can we find any other arguable error in the record. We have closely reviewed the court file in all its particulars and have satisfied ourselves there is no

appellate issue that would undermine this conviction or the sentence imposed for it. The judgment is therefore affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.